IN THE

Supreme Court of the United States

October Term, 1979

NO. 78-1642

ST. REGIS PAPER COMPANY,
Petitioner,

v.

RAY MARSHALL, SECRETARY OF LABOR, et al.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

BRIEF OF AMICUS CURIAE ALASKA LUMBER & PULP COMPANY

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Pursuant to Rule 42.1 of the Supreme Court of the United States, Alaska Lumber & Pulp Company has obtained the consent of both parties to file a brief amicus curiae. A copy of a letter from each party granting consent has been filed with the clerk of the Court.

QUESTIONS PRESENTED

Must administrative remedies be exhaused if:

a. A litigant is threatened with economic coercion which prevents an effective challenge to the regulations upon which the agency's action is based; or

b. Administrative regulations are challenged as being beyond an agency's authority and an agency's refusal to consider this challenge ensures a litigant's defeat at an administrative hearing; or

c. A litigant is threatened with irreparable harm and no governmental interest is served by further administrative proceedings; or

d. A sanction an agency seeks to impose in enforcement proceedings is clearly beyond its authority; or

e. Procedural regulations established by an agency to which a litigant is subjected are contrary to specific and unambiguous language of the agency's governing law?

STATEMENT OF AMICUS' INTEREST

Alaska Lumber & Pulp (ALP) appears as amicus curiae and urges acceptance of certiorari in this case because it is presently facing the same dilemma as St. Regis. It must either risk financial ruin by loss of government contracts while it proceeds through protracted but meaningless administrative procedures before it can litigate a critical issue of law, or pay financial tribute to retain its status as a government contractor.

ALP has a pulp mill in Sitka, Alaska which is wholly dependent upon contracts with the United States Forest Service as the source for its raw product. A debarment or passover from these contracts would close the mill at Sitka. Twelve hundred employees would be put out of work and ALP would suffer irreparable financial harm. Although ALP has entered into an agreement with the Office of Federal contract Compliance Programs (OFCCP) which provides for all the prospective relief possible under Executive Order 11246, the agency is issuing an Administrative Complaint and demanding retrospective back pay of between $500,000 and

$3,000,000 for an "affected class" of female job applicants.

ALP takes the position that OFCCP has no power under the Executive Order to exact back pay. That is a question of law which cannot be resolved under OFCCP regulations in administrative proceedings (see Part II infra), and which ALP ultimately must litigate, if at all, after payment of back pay or debarment for nonpayment. So long as OFCCP refuses to decide the legal issue of its authority to recover back pay and can use its debarment power after negative administrative findings to ruin a company which would choose post-exhaustion judicial review, it can extort huge sums of money from government contractors like ALP. This is too great a price for anyone's right to have an important question of law decided. This explains why, despite Executive Order 11246's thirteen-year existence, the legality of retrospective remedies has never been conclusively decided. ALP implores, as amicus curiae, that petitioner be allowed to present the question now without further exhaustion of meaningless remedies.

STATEMENT OF THE CASE

St. Regis Paper Company is a major producer of lumber and paper products. As a government contractor and subcontractor it must comply with the affirmative obligations imposed by Executive Order 11246 to achieve nondiscrimination in employment. General Services Administration (GSA), the designated compliance agency, reviewed St. Regis' employment practices at its Libby, Montana lumber mill and issued a show cause notice on March 22, 1976 claiming that St. Regis underutilized females and should be prohibited from further government contracting until its alleged deficiencies were satisfactorily corrected. Such a "passover" from government contracting is permitted by an OFCCP regulation, 41 C.F.R. § 60-2.2(b) (1978), although § 208(b) of Executive Order 11246 unambiguously requires an opportunity for a hearing before a contractor is barred from further government contracting. St. Regis' continued status as a government contractor and subcontractor was uncertain because it had not been assured it would not be passed over without a hearing. St. Regis

asked OFCCP, the agency primarily responsible for enforcing Executive Order 11246, for a hearing. St. Regis subsequently filed suit on April 7, 1976 in the United States District Court for the District of Colorado requesting that OFCCP's enforcement proceedings be enjoined until OFCCP complied with the hearing requirement of § 208(b). Two weeks later OFCCP gave St. Regis a conditional and ambiguous promise that it would not be passed over as a result of the March 22, 1976 show cause notice without a hearing.

OFCCP issued a show cause notice on May 14, 1976 seeking to recover back pay for St. Regis' alleged compliance deficiencies. Thereupon St. Regis amended its complaint by asking the court to declare back pay an impermissible remedy under Executive Order 11246.

GSA and St. Regis entered into a conciliation agreement on June 2, 1976 which resolved all issues pertaining to the March 22 show cause notice (Pet. App. 34a-37a). St. Regis received no assurance that the May 14 show cause notice would not be used

as a basis to prohibit it from government contracting, and St. Regis again requested a hearing before OFCCP. On June 29, 1976, while St. Regis' suit was still pending in the Colorado federal court, OFCCP assured St. Regis it would not be prohibited from contracting with the Government as a result of the second show cause notice.

OFCCP has indicated only factual matters will be examined at a hearing to determine if St. Regis should be subjected to back pay liability or prohibited from government contracting. OFCCP has flatly refused to consider St. Regis' two legal challenges: (1) OFCCP's practice of prohibiting government contracting until a show cause notice is favorably resolved violates § 208(b) of Executive Order 11246 and the Due Process Clause of the Fifth Amendment; and (2) OFCCP has no authority under Executive Order 11246 to recover back pay from a noncomplying contractor.

Both lower courts held that St. Regis must exhaust administrative proceedings. These holdings disregard the following facts: (a) the legal issues raised by petitioner challenge OFCCP's

action as being in excess of authority; (b) OFCCP's administrative law judge refuses to hear St. Regis' arguments and states he will not, under any circumstances, overturn its challenged regulations; and (c) denial of immediate judicial examination of OFCCP's actions threatens petitioner with irreparable harm caused by summary deprivation of government contracts before its challenge to OFCCP's regulations is resolved in court.

SUMMARY OF ARGUMENT

A. Exhaustion forces a government contractor either to risk being deprived of contracts or capitulate to OFCCP by paying back pay. This threatened economic coercion immunizes OFCCP's questionable regulations from effective legal challenge. Unless this threat is removed, the legality of OFCCP's practice of passing over contractors without a hearing and its authority to demand back pay will remain academic issues.

B. Additional administrative proceedings are pointless, because OFCCP refuses to consider petitioner's challenge to its regulations. Even if

OFCCP's conduct was not so cavalier, agency expertise is not germane when regulations are challenged as being in excess of an agency's authority. Such a challenge is particularly appropriate for judicial resolution.

C. Exhaustion threatens petitioner with irreparable harm because it may irrevocably lose government business before its challenges are considered in court. No administrative purpose is served by requiring additional and fruitless administrative proceedings.

D. Exhaustion will not be required if an agency: (1) clearly is exceeding its authority; (2) violates an ambiguous directive of its governing law; or (3) commits a clear constitutional violation. OFCCP's demand for back pay falls within the first exception, for it is not authorized by Executive Order 11246 and is not a legitimate implied remedy. OFCCP's practice of "passing over" a "nonresponsible" contractor until it proves compliance clearly violates § 208(b) of the Executive Order, which requires that a contractor have

an opportunity for a hearing before being prohibited from government contracting. This practice also violates due process. Only in extraordinary circumstances may contractual property rights be suspended before a hearing. Not only are such circumstances absent, but OFCCP's procedures threaten a contractor with summary deprivation of its economic lifeblood unjustified by any administrative necessity.

ARGUMENT

I. Exhaustion Threatens a Government Contractor with Economic Coercion Which Operates to Immunize OFCCP's Questionable Regulations from Effective Legal Challenge.

This petition does not simply raise another garden-variety question about exhaustion of administrative remedies. Continued regard for this case as involving a pedestrian exhaustion issue would not only harm petitioner irreparably but would have grave implications for thousands of government contractors, of which amicus curiae is one, dependent upon government business for their economic well-being, but who are subject to the vagaries of OFCCP's uncontrolled life-or-death

power over them. Both lower courts treated this litigation as a routine exhaustion case without appreciating that it involves the enforcement arm of an executive department which operates without statutory authorization, and is restrained only by the vaguest procedural regulations, which, as this Court has recently intimated, are of questionable validity. Chrysler Corp. v. Brown, 99 S. Ct. 1705, 1719-20 (1979).

Requiring exhaustion is tantamount to sanctioning an extortionate practice. It insulates OFCCP's regulations from effective challenge. Contractors cannot afford the loss of government contracts which would follow from an adverse administrative determination while they pursue a judicial challenge. It is bitterly ironic that in the present case an adverse determination will be based on the very regulations which petitioner sought to challenge, but which the lower courts refused to permit. Exhaustion thus requires a contractor to pursue an uncertain and perilous path, for it must risk summary deprivation of its means of economic subsistence. Given the great

hazard involved and the uncertainty of success, a contractor cannot risk traveling this path. Without immediate judicial examination of OFCCP's regulations, a contractor is forced to risk its well-being upon OFCCP's unrestrained discretion to forbid it from contracting with the goverment while the contractor seeks administrative or judicial relief. A contractor thus faces a harsh and brutally simple choice: either challenge OFCCP's action and take the risk of incurring a debilitating loss of contracts, or capitulate to OFCCP by paying tribute in the form of back pay to ensure economic survival. See B. Schlei & P. Grossman, Employment Discrimination Law 202 (Supp. 1979).

In unexaggerated terms, dealings with OFCCP are characterized by threatened or actual economic strangulation rather then procedural regularity and fairness. OFCCP can blithely issue show cause notices, secure in the knowledge that a contractor cannot effectively contest its action since it does not know if OFCCP will decide not to pass it over until its legal challenge, which OFCCP itself will not consider, is resolved in court. Such an abuse

of proper administrative procedure can be prevented only by ensuring a contractor it will not be denied Government contracts prior to a hearing, during administrative appeals, and before judicial review should the contractor not prevail at the hearing. Since petitioner received only the first assurance, it should not be required to pursue the pointless hearing offered by OFCCP.

Only if the exhaustion impediment is removed can OFCCP be prevented from insulating its dubious regulations from effective legal challenge. Such a challenge is imperative, for "the extent of OFCCP enforcement authority must now be viewed as the preemient issue in equal employement law." Kilberg, OFCCP -- Enforcement and Back Pay Issues, 3 Employee Relations L.J. 347, 352 (1978).

II. Exhaustion is Unnecessary Because Administrative Expertise is not Germane when Regulations Are Challenged as Exceeding an Agency's Authority, and that Agency Refuses to Consider the Challenge.

To determine if exhaustion of administrative remedies should be required, OFCCP's administrative scheme must be rigorously scrutinized. See, e.g., Weinberger v. Salfi, 422 U.S. 749, 765 (1975). The

only allegations petitioner has made in the present case are that OFCCP's regulations permitting passover without prior hearing[1] and recovery of back pay[2] are in excess of the authority granted to OFCCP by Executive Order 11246. OFCCP has refused, and its regulations prevent, consideration of petitioner's legal challenge. 41 C.F.R. § 60-30.6(b) (1978). OFCCP intends to subject petitioner to the delay, expense, and threatened economic coercion which accompany further administrative proceedings when OFCCP has foreclosed by its own actions and pronouncements the only issues petitioner wishes to advance. The result of such a "hearing" is preordained, and exhaustion should not be required when "it is clear beyond doubt that the . . . agency will not grant the relief in question." American Federation of Government Employees

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1 41 C.F.R. § 60-2.2(b) (1978).

2 41 C.F.R. § 1.26(a)(2) (1978); 41 C.F.R. § 60-2.1(b) (1978).

v. Acree, 475 F.2d 1289, 1292 (D.C. Cir. 1973). See L. Jaffe, Judicial Control of Administrative Action 466 (1965).

OFCCP has, in effect, taken a final position, and hence final administrative action, on petitioner's challenge to its regulations. This Court has long recognized that a litigant will not be compelled to traverse a barren administrative path. See, e.g., Weinburger v. Salfi, 422 U.S. 749, 765-66 (1975); NLRB v. Industrial Union of Marine & Shipbuilding Workers, 391 U.S. 418, 428 n.8 (1968); United States v. Anthony Grace & Sons, 384 U.S. 424, 429-30 (1966); City Bank Farmers Trust Co. v. Schnader, 291 U.S. 24, 34 (1934). See L. Jaffe, Judicial Control of Administrative Action 466 (1965). If an agency is unresponsive to a challenge to its regulations, exhaustion is futile and will not be required. American Federation of Government Employees v. Acree, 475 F.2d 1289, 1292 (D.C. Cir. 1973). See Air Products & Chemicals, Inc. v. United Gas Pipeline Co., 503 F.2d 1060, 1063 (Temp. Emer. Ct. App. 1974); Consumers Union

of the United States, Inc. v. Cost of Living Council, 491 F.2d 1396, 1399-1400 (Temp. Emer. Ct. App.), cert. denied, 416 U.S. 984 (1974); Bradley v. Laird, 449 F.2d 898, 900 (10th Cir. 1971); Philips Petroleum Co. v. FEA, 435 F. Supp. 1239, 1248 (D. Del. 1977); Garmon v. Warner, 358 F. Supp. 206, 208-09 (W.D.N.C. 1973). Similarly, failure to consider legal issues, here OFCCP's passover practice and authority to recover back pay, renders exhaustion pointless.[3] If an agency has taken a final position on a crucial matter in issue, as OFCCP has done concerning its passover practice and authority to demand back pay, a litigant has no obligation to seek further administrative recourse in the vain hope that the agency may do an abrupt about-face and change its own regulations. See Consumers Union of the United States, Inc. v. Cost

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3 Philips Petroleum Co. v. FEA, 435 F. Supp. 1239, 1248 (D. Del. 1977). A purported administrative remedy must be relevant to a litigant's claim. L. Jaffe, Judicial Control of Administrative Action 428 (1965). Since the "remedy" of a hearing offered by OFCCP will not address petitioner's challenge to its regulations, the proffered remedy is irrelevant.

of Living Council, 491 F.2d 1396, 1399-1400 (Temp. Emer. Ct. App.), cert. denied, 416 U.S. 984 (1974); Philips Petroleum Company v. FEA, 435 F. Supp. 1238, 1248 (D. Del. 1977).

Even if OFCCP was willing to consider petitioner's arguments, exhaustion would not be required because "[c]ourts will not insist on exhaustion when the particular issue involved is a constitutional and/or legal one and is not one addressed to a particular area of administrative expertise." Comprehensive Group Health Board of Directors v. Temple University, 363 F. Supp. 1069, 1098 (E.D. Pa. 1973). The present case does not concern interpretation of OFCCP's regulations, a matter to which OFCCP could properly apply its expertise. The regulations are clear; petitioner challenges their very existence. When regulations are challenged as being in excess of authority, agency expertise is not relevant and the issue is particularly appropriate for judicial resolution. See Chicago v. Atchison, T. & S.F. Ry., 357 U.S. 77 (1958); Consumers Union of the United States, Inc. v. Cost of Living Council, 491

F.2d 1396, 1399 (Temp. Emer. Ct. App.), cert. denied, 416 U.S. 989 (1974); Borden, Inc. v. FTC, 495 F.2d 785, 787 (7th Cir. 1974); Fairchild, Arabatzis & Smith v. Sackheim, 451 F. Supp. 1181, 1186 (S.D.N.Y. 1977); K. Davis, Administrative Law Treatise § 20.04, at 74 (1958).

The Government's contention that the present case is unripe for judicial resolution because OFCCP has granted a hearing at which it might ostensibly find for petitioner[4] is ludicrous. Even if OFCCP's refusal to hear petitioner's arguments did not predetermine the result of a later proceeding, this Court has recognized sub silentio that the possibility of success on factual issues does not invaribly require that adminstrative remedies be exhausted.[5] Although § 208(b) unambiguously requires that a contractor be afforded a

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[4] Brief for Respondent at 11-12.

[5] K. Davis, Administrative Law Treatise § 20.00-1, at 149 (Supp. 1978) (explaining Mathews v. Eldridge, 424 U.S. 319 (1976)).

hearing before termination of government contracts, it was only after the present litigation was initiated that OFCCP promised petitioner a hearing before such a termination. Since 41 C.F.R. § 60-2.2(b) (1978) permits OFCCP to grant or deny a hearing in its unbridled discretion, St. Regis faced a dangerously uncertain future when it initiated the present action. St. Regis had no assurance that it would not be prohibited from contracting with the Government. Petitioner was thus compelled to seek judicial protection from OFCCP's threatened actions. Petitioner will be subjected to a flagrant inequity if it is forced to regress to a futile administrative proceeding which threatens it with irreparable harm, when the necessity of seeking judicial relief was brought about by OFCCP's noncompliance with its own governing law.

If a suit is proper at its inception a later promise by the Government cannot defeat it. See, Abbott Laboratories v. Gardner, 387 U.S. 136, 154 (1967). The argument that exhaustion is compelled if OFCCP decides to grant a hearing has recently

been decisively and unequivocally rejected:

> [P]laintiff has alleged a governmental policy which can adversely affect its interests, an alleged violation of the Federal Constitution which is capable of repetition and which defendants [OFCCP] cannot render moot merely by granting an administrative hearing.
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> ....
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> ... The show-cause letter which plaintiff received . . . and the status into which plaintiff was put as a result of that letter, are steps in the administrative process which can cause harm to the plaintiff, which can be repeated at any time so far as the record shows, and which the plaintiff is entitled to have reviewed by this Court in our opinion. Therefore the pending administrative hearing does not remove the allegedly unconstitutional harm which can be caused by another letter to show cause.

Illinois Tool Works, Inc. v. Marshall, 17 E.P.D. 6375, 6376 (N.D. Ill. 1978), aff'd, 48 U.S.L.W. 2075 (7th Cir. July 20, 1979).

OFCCP's belated grant of hearing is an attempt to blunt petitioner's challenge to its regulations, but this offer neither protects petitioner from a post-hearing passover before judicial review, nor does it purge OFCCP's passover practice of its illegality.

III. Exhaustion Should not be Required Because It Threatens Petitioner with Irreparable Harm and Will Serve no Administrative Interest.

Even if some plausible purpose might be served by forcing petitioner to pursue administrative proceedings in which OFCCP will not consider its arguments, exhaustion is still discretionary; e.g., NLRB v. Industrial Union of Marine & Shipbuilding Workers, 391 U.S. 418, 426 n.8 (1968); United States v. Abilene & S. Ry., 265 U.S. 274, 282 (1924); Kale v. United States, 489 U.S. 449, 454 (9th Cir. 1973); and the harm to an individual if judicial relief is delayed must be balanced against any governmental interests favoring exhaustion.[6] Only two colorable interests support exhaustion here: (1) OFCCP should be permitted to make a decision concerning petitioner's challenge free from judicial intervention; and (2) exhaustion

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6 E.g., Eluska v. Andrus, 587 F.2d 996, 999 (9th Cir. 1978); Montgomery v. Rumsfeld, 572 F.2d 250, 253 (9th Cir. 1978); United States v. Newmann, 478 F.2d 829, 831 (8th Cir. 1973). See McKart v. United States, 395 U.S. 185, 197 (1969) (court must weigh governmental interest and burden upon litigant in determining if exhaustion is required). Professor Davis appears to approve of a balancing test for determining if exhaustion is appropriate. K. Davis, Administrative Law Treatise § 20.01, at 449 (Supp. 1976).

prevents contractors from deliberately flouting the administrative process. Montgomery v. Rumsfeld, 572 F.2d 250, 253 (9th Cir. 1978).

The first consideration is not germane for the simple reason that there will be no decision on petitioner's challenge, because OFCCP refuses to consider the only arguments St. Regis advances. Moreover, the issues raised by the present proceeding, the unconstitutional practice of denying government contracts without a hearing, and the purported authority under the Executive Order to passover a contractor and to recover back pay, challenge OFCCP's very authority. As noted earlier, such issues are clearly beyond administrative expertise, and judicial resolution of them would not infringe on OFCCP's decision-making independence.

The second consideration is equally inapplicable. A contractor who receives a show cause notice has no inkling whether it will be granted a hearing, for OFCCP possesses unfettered discretion either to approve or reject a contractor's hearing request. There is simply no established process

for a contractor to flout, because the entire administrative process, if any, is created according to the happenstance exercise of OFCCP's discretion. A contractor thus does not know if any process will even exist until OFCCP rules on its request for a hearing. Nor can a contractor placidly await OFCCP's decision. During that interim between the issuance of a show cause notice and OFCCP's decision, a Damoclean threat hangs over that contractor's economic survival, for it may be deprived of contracts without any procedural protection. A contractor will be motivated to seek immediate judicial relief, not because it wishes to obstruct an established administrative procedure, but rather because it must seek to avoid OFCCP's threatened economic extortion. It is ludicrous to assert that exhaustion is necessary to prevent flouting an administrative process OFCCP can choose either to establish or not when it is precisely OFCCP's coercive tactics which impel a contractor to seek judicial relief simply to survive. In requesting judicial protection a contractor merely responds naturally to the economic bludgeon wielded by OFCCP.

While no administrative interest would be served by denying immediate judicial examination of OFCCP's conduct, such a denial threatens petitioner with irreparable harm. Although OFCCP has ambiguously promised St. Regis it will not be denied government contracts prior to a hearing, it has no assurance that it will not be prohibited from receiving valuable subcontracts. See 41 C.F.R. § 60-1.4(b)(7) (1978). Since OFCCP refuses to consider the only arguments petitioner wishes to make, the result of any hearing is preordained. If petitioner does not receive government contracts during the interim between an adverse decision at a hearing and the time a court reviews the legality of OFCCP's practices, St. Regis will incur unrecoverable financial losses and disruption of its planning and operations. See Sunstrand Corp. v. Marshall, 17 E.P.D. 7138, 7141 (N.D. Ill. 1978); Pan American World Airways, Inc. v. Marshall, 439 F. Supp. 487, 497 (S.D.N.Y. 1977). The possibility that petitioner could avoid this havoc by securing a preliminary injunction prohibiting a passover is remote, because it would be compelled to satisfy

arduous criteria as a prerequisite to such extraordinary relief.[7] Neither has OFCCP assured St. Regis that debarment or passover would be stayed pending judicial resolution of petitoner's challenges. The threatened irreparable harm to petitioner is clear and immediate, and petitioner has no plausible prospect for obtaining relief in the interim between its loss in an administrative hearing and a judicial determination of the legality of OFCCP's actions.

Balancing the devastating threat facing petitioner from a denial of judicial relief prior to completing administrative proceedings against any

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[7] A preliminary injunction is a discretionary and extraordinary remedy with the burden on the movant to show: (1) it will be irreparably harmed if the injunction is not granted; (2) its interests outweigh any injury to the Government if the injunction is granted; (3) probable success on the merits; and (4) an injunction would be in the public interest. 11 C. Wright & A. Miller, Federal Practice and Procedure § 2948, at 430-31 (1973). Accord 7, Pt. 2 Moore's Federal Practice § 65.04[1] (2d ed. 1979). See, e.g., Uniroyal, Inc. v. Marshall, 48 U.S.L.W. 2100 (D.C. Cir. July 26, 1979) (debarred contractor's request for injunction pending appeal denied).

countervailing administrative interests demonstrates exhaustion is inapplicable.

IV. Exhaustion of Administrative Remedies Is Improper Because OFCCP's Purported Authority to Recover Back Pay Is Clearly Beyond the Powers Granted to It by Executive Order 11246, and OFCCP's Passover Practice Is a Plain Violation of § 208(b) of the Executive Order

Exhaustion will not be required if an administrative agency: (1) clearly exceeds its delegated authority; (2) acts contrary to specific and unambiguous language of its governing law;[8] or (3) violates the Constitution.[9] To determine

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8 Fairchild, Arabatzis & Smith v. Sackheim, 451 F. Supp. 1181, 1184 (S.D.N.Y. 1978); Pan American World Airways, Inc. v. Boyd, 207 F. Supp. 152, 160 (D.D.C. 1962). See Skinner & Eddy Corp. v. United States, 249 U.S. 557, 562-63 (1919) (Brandeis, J.); Coca-Cola Co. v. FTC, 475 F.2d 299, 303 (5th Cir.), cert. denied, 414 U.S. 877 (1973); State of California ex rel. Christensen v. FTC, 549 F.2d 1321, 1324 (9th Cir. 1977). In Leedom v. Kyne, 358 U.S. 184 (1958), this Court held that judicial review of administrative action will be permitted if the agency clearly acts in excess of its delegated authority or contrary to a clear directive of its governing law.

9 McCormick v. Hirsch, 460 F. Supp. 1337, 1344 (M.D. Pa. 1978).

if the first exception applies, the derivation of OFCCP's purported authority under Executive Order 11246 to recover back pay must be examined. The second exception to the exhaustion doctrine is applicable if OFCCP's practice of passing over a contractor is clearly contrary to the Executive Order's specific directive in § 208(b) that a contractor may not be debarred without an opportunity for a hearing. The last exception is germane if a passover violates the Due Process Clause of the Fifth Amendment. We now turn to an examination of these questions.

A. OFCCP's Purported Authority to Recover Back Pay Clearly Exceeds the Powers Delegated to it by Executive Order 11246.

The sanctions for violating Executive Order 11246[10] are precise and prospective, whereas

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10 The only sanctions mentioned in § 209 of Executive Order 11246 are: (1) publishing the names of violators of the Executive Order; (2) recommending enforcement action by the Department of Justice; (3) recommending to the Equal Employment Opportunity Commission and the Department of Justice that Title VII proceedings be filed; (4) recommending to the Department of Justice that criminal proceedings be filed if a contractor furnishes false information; (5) termination, suspension or cancellation of existing contracts; and (6) debarment from further contracting.

back pay is not specified, is imprecise, and is a retrospective remedy. Because back pay is not expressly mentioned, its validity must rise or fall on whether it can be legitimately implied as a permissible punitive or remedial measure.

Back pay is not a punitive sanction, as it is a restitutionary remedy designed to compensate victims of discrimination, and not to punish. See Curtis v. Loether, 415 U.S. 189, 197 (1974); Pearson v. Western Elec. Co., 542 F.2d 1150, 1152 (10th Cir. 1976); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1376 (5th Cir. 1974); Robinson v. Lorillard Corp., 444 F.2d 791, 802 (4th Cir.), petition dismissed, 404 U.S. 1006 (1971). Cf. Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159, 176 (3d Cir.), cert. denied, 404 U.S. 854 (1971) (Executive Order 11246 not intended to punish misconduct). Since back pay is not a punitive sanction, its propriety can be justified, if at all, only as a remedial measure.

Executive Order 11246 has been upheld on the grounds that it helps to prevent government contractors from indirectly raising costs and delaying programs by discriminatorily excluding minorities from their labor pool. Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159, 170 (3d Cir.), cert. denied, 404 U.S. 854 (1971). The executive's interest in enlarging the labor pool available to perform government contracts, thereby reducing costs and delay, is insufficient justification for the imposition of possibly devastating back pay liability upon a government contractor. See B. Schlei & P. Grossman, Employment Discrimination Law 749 (1976).[11] Such liability could severely disrupt a contractor's operations, thereby increasing costs and delay.

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[11] Accord Callahan, Defending Enforcement of Executive Order 11246 against Federal Construction Contractors: A Quagmire of Uncertainty, 30 Ad. L. Rev. 519, 531 (1978).

Private individuals have no cause of action under the Executive Order,[12] and if back pay is construed as a legitimate remedial measure these individuals would be given a remedy (back pay) they lack standing to claim.[13] A governmental cause of action should not be implied, because private individuals may recover back pay under Title VII of the Civil Rights Act of 1964.[14] The Executive

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12 E.g., Cohen v. Illinois Institute of Technology, 524 F.2d 818 (7th Cir. 1975), cert. denied, 425 U.S. 943 (1976); Weise v. Syracuse Univ., 522 F.2d 397 (2d Cir. 1975); Farkas v. Texas Instruments, Inc., 375 F.2d 629 (5th Cir.), cert. denied, 389 U.S. 977 (1967); Farmer v. Philadelphia Elec. Co., 329 F.2d 3 (3d Cir. 1964). See B. Schlei & P. Grossman, Employment Discrimination Law 202 (Supp. 1979); Comment, Executive Order 11246, Presidential Power to Regulate Employment Discrinination, 43 Mo. L. Rev. 451, 470-74 (1978). Lewis v. Western Airlines, Inc., 379 F. Supp. 684 (N.D. Cal. 1974), occasionally cited for the proposition that a private cause of action exists under the EXecutive Order, does not so hold.

13 Title VII of the Civil Rights Act of 1964 is distinguishable from the Executive Order on this point. Back pay can be recovered by the Government (the EEOC) for individuals, and individuals may sue in their own right to recover back pay. 42 U.S.C. § 2000e-5 (1976).

14 See note 13 supra.

Order does not give the Government a jus tertii action to assert rights of alleged discriminatees, for "all enumerated sanctions deal with punitive action to be taken against the contractor, rather than remedial action to be taken on behalf of third parties."[15]

In any event, such a remedy would be unconstitutional. The separation of powers principle will be meaningless if an executive edict devoid of statutory authorization may vest the Government with a cause of action against private individuals to benefit third parties in furtherance of the executive's objectives. Upholding such a presidentially-created cause of action would sanction flagrant legislating by the executive when that power rests solely with Congress.

Back pay is also impermissible because the regulations upon which OFCCP bases its authority to extract it are invalid. Regulations promulgated under Executive Order 11246 have no legal effect unless Congress has delegated some requisite

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15 Comment, supra note 12, at 494 n.223.

authority for them. Chrysler Corp. v. Brown, 99 S. Ct. 1705, 1719 (1979). The only possible legislative bases for OFCCP's regulations are Titles VI and VII of the Civil Rights Act of 1964,[16] the Equal Employment Opportunity Enforcement Act of 1972,[17] and the Federal Property and Administration Services Act of 1949.[18] For reasons indicated by petitioner,[19] the former two cannot justify the imposition of back pay liability, and presidential procurement power is deficient for the

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16 42 U.S.C. §§ 2000d to 2000d-4; 2000e to 2000e-17 (1976).

17 Pub. L. No. 92-261, 86 Stat. 103 (1972).

18 Pub. L. No. 81-152, 63 Stat. 377, as amended, 40 U.S.C. §§ 471-514 (1976).

19 Brief for Petitioner 11-17.

reasons stated at page 29, supra.[20] Judicial[21] and scholarly[22] authorities agree that back pay liability is unwarranted.

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20 In addition to these purported statutory bases for the Executive Order, it has been suggested that in exercising its procurement power the executive may impose contractual terms to further policy objectives. Such a basis for the Order is of dubious validity, since it would authorize the executive unilaterally to formulate and implement broad policy objectives upon which a congressional or national consensus may be lacking. Morgan, Achieving National Goals through Federal Contracts: Giving Form to an Unconstrained Administrative Process, 1974 Wis. L. Rev. 301, 304; Comment, supra note 12, at 481-82.

21 United States v. Lee Way Motor Freight, Inc., 15 F.E.P. 1385, 1398-99 (W.D. Okla. 1977). Cf. United States v. East Texas Motor Freight System, 564 F.2d 179, 184 (5th Cir. 1977) (retrospective seniority relief improper for violation of Executive Order 11246). The lone decision allowing back pay; United States v. Duquesne Light Co., 423 F. Supp. 507 (W.D. Pa. 1976), has subsequently been specifically rejected; United States v. Lee Way Motor Freight, Inc., 15 F.E.P. 1385, 1398-99 (1977), and severely criticized. Comment, supra note 12, at 490-93.

22 Comment, supra note 12, at 487-95. See B. Schlei & P. Grossman, Employment Discrimination Law 349 (1976), 202 (Supp. 1979) (contractor forced to choose between paying back pay and possible loss of future contracts); Callahan, supra note 11, at 531 (suggesting back pay rests on dubious grounds).

OFCCP is clearly exceeding its authority by seeking to recover back pay from petitioner because: (1) back pay is not expressly authorized by § 209 of the Executive Order; (2) back pay cannot be implied as a legitimate punitive or remedial measure; and (3) the regulations upon which OFCCP bases its authority to recover it were promulgated without any delegation of legislative authority. For these reasons any contention that petitioner must exhaust administrative proceedings is incorrect.

B. OFCCP's Passover Practice Violated the Clear Command of § 208(b) of Executive Order 11246 that a Contractor May not Be Prohibited from Government Contracting Without an Opportunity for a Hearing.

Section 208(b) of Executive Order 11246 specifically requires that a contractor be given an opportunity for a hearing before a "debarment." Yet, OFCCP believes it may prohibit a "nonresponsible" contractor from receiving additional government contracts until alleged compliance

deficiencies are resolved, and OFCCP's regulations do not require a hearing on the determination of "responsibility." Thus, under OFCCP procedures a contractor may be punished before the question of whether it violated the Executive Order is resolved. The blameless are threatened with the same economic extortion as the culpable. OFCCP contends "passing over" a contractor during this interim before a hearing is not a "debarment."

Whether agency action is labeled a debarment is immaterial. Myers & Myers, Inc. v. United States Postal Service, 527 F.2d 1252, 1259 (D.C. Cir. 1975); Pan American World Airways, Inc. v. Marshall, 439 F. Supp. 487, 496 (S.D.N.Y. 1977). Effects must control in determining whether § 208(b) applies. Otherwise, supposedly temporary suspensions from government contracting may be employed as device to circumvent the procedural protections of a hearing,[23] or to economically coerce compliance with OFCCP's interpretation of the Executive Order. See Pan American World

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23 Morgan, supra note 20, at 336-37.

Airways, Inc. v. Marshall, 439 F. Supp. 487, 495 (S.D.N.Y. 1977).

The crucial question is whether a passover is the equivalent of a debarment under the provisions of § 208(b). The Seventh Circuit, in line with the overwhelming consensus of authority, has recently held that it is. Illinois Tool Works, Inc. v. Marshall, 48 U.S.L.W. 2075 (7th Cir. July 20, 1979), aff'g, 17 E.P.D. 6375 (N.D. Ill. 1978). As was correctly noted in Pan American World Airways, Inc. v. Marshall, 439 F. Supp. 487, 495 (S.D.N.Y. 1977):

> [T]he only difference between a "debarment" as functionally defined in the Order and a "passover" . . . is the number of government contracts affected. However, the Order does not authorize denial of . . . any number of contracts before a "debarment" is held to have occurred. To the contrary, the language "further contracts" of Section 209(a)(6) of the Order indicates that a "debarment" occurs when any contract is denied on the basis of noncompliance.

Accord Crown Zellerbach Corp. v. Marshall, No. 77-3036 (5th Cir. Nov. 17, 1977) (contractor may not be found "nonresponsible" without a hearing); Crown Zellerbach Corp. v. Wirtz, 281 F. Supp. 337,

340-41 (D.D.C. 1968) (Sirica, J.); B. Schlei & P. Grossman, Employment Discrimination Law 201 n.26 (Supp. 1979) (nine cases cited therein). Scholarly opinion agrees with these decisions; a passover is the same as "summary debarment and, thus, contrary to administrative due process and the procedures established in [Executive Order 11246] regulations."[24]

Since a passover has the same effect as a debarment, OFCCP's practice of passing over a contractor once a show cause notice is issued clearly violates the unambiguous prohibition of § 208(b).[25] St. Regis is thus entitled to immediate judicial examination of the legality of OFCCP's actions.

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[24] Callahan, supra note 11, at 530.

[25] OFCCP's passover practice is also contrary to 42 U.S.C. § 2000e-17 (1976), which provides that an employer may not be denied a government contract pursuant to any equal opportunity order without a "full hearing and adjudication" in accordance with 5 U.S.C. § 554 (1976) if the employer's affirmative action plan was accepted by the Government within the past 12 months.

C. Petitioner Was Improperly Required to Exhaust Administrative Remedies Because OFCCP's Passover Practice Violates Due Process.

Exhaustion is also not required when an agency violates the Constitution, and the violation is clear. McCormick v. Hirsch, 460 F. Supp. 1337, 1344 (M.D. Pa. 1978). OFCCP's practice of passing over a contractor without a hearing is a deprivation of property without due process, and petitioner is therefore not obligated to exhaust the proceedings OFCCP now offers.

A contractural relationship with the Government creates property rights protected by the Due Process Clause of the Fifth Amendment. See Perry v. United States, 294 U.S. 330 (1935); Lynch v. United States, 292 U.S. 571, 579 (1934). The extent of procedural due process afforded such a right is determined by weighing the recipient's interest in avoiding loss of that right and the governmental interest in swift adjudication. Goldberg v. Kelly, 397 U.S. 254, 263 (1970). See Goss v. Lopez, 419 U.S. 565, 579 (1975).

OFCCP's passover practice is accordingly constitutional only if its need for such a procedure outweighs the harm to a contractor from a threatened summary deprivation of its means of livelihood. Cf. Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (violation of due process for eligible welfare recipients to be denied benefits while dispute with welfare agency is processed).

The most analogous decision of this Court is Arnett v. Kennedy, 416 U.S. 134 (1974). Application of a traditional due process approach indicated a government employee was not entitled to a predischarge hearing when he was protected from an erroneous termination by the availability of welfare assistance and back pay and his continued retention before a hearing could cause significant problems for his employer. Id. at 164-71 (Powell, J., concurring).

Unlike the public employee in Arnett, a contractor is not protected while its case is being resolved. This is true because, although a contractor will not lose contracts before a hearing, it may be deprived of valuable subcontracts.

See 41 C.F.R. § 60-1.4(b)(7) (1978); Illinois Tool Works, Inc. v. Marshall, 48 U.S.L.W. 2075 (7th Cir. July 20, 1979).[26] Nor can a contractor recoup such losses. A post-debarment hearing would therefore be totally ineffective. A contervailing governmental necessity for debarring a contractor pending resolution of an alleged compliance deficiency is difficult to discern. See Crown Zellerbach Corp. v. Wirtz, 281 F. Supp. 337, 340 (D.D.C. 1968) (Sirica, J.). Unlike the situation in Arnett, retention of a contractor pending a judicial hearing would not substantially hinder an agency's function or otherwise significantly impair governmental interests. The marginal increment in costs and delay that would arguably accompany such a judicial hearing pale into comparative insubstantiality when balanced against the harm to a contractor from a debarment.

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26 For a description of other adverse consequences that may arise from a suspension from government contracting, see Gonzalez v. Freeman, 334 F.2d 570, 574 (D.C. Cir. 1964) (Burger, J.).

Lastly, OFCCP's passover practice violates the principle that if the recipient of a government benefit has a substantial interest in retaining it, that benefit may not be summarily withdrawn, even temporarily, without affording the recipient some minimal pre-deprivation hearing if post-deprivation relief would be inadequate. Goss v. Lopez, 419 U.S. 565 (1975) (pupil suspended from school for ten days entitled to pre-suspension hearing unless pupil is a continuing threat to persons or property). See Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1978). Due process requires a hearing before an individual is deprived of any significant property interest, and this requirement is inapplicable only in "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." Boddie v. Connecticut, 401 U.S. 371, 379 (1971) (emphasis added) (footnotes omitted).

As no extraordinary circumstances exist to justify a contractor's summary debarment, OFCCP's

passover practice clearly violates the Due Process Clause and petitioner is therefore entitled to immediate judicial relief.

CONCLUSION

Although the exhaustion doctrine as it stands entitles petitioner to immediate judicial relief, we must acknowledge that this area of the law is less than clear. Professor Davis notes that exhaustion "is about as unprincipled as any subject on which judicial opinions are written can be." K. Davis, Administrative Law Treatise § 20.07, at 466 (Supp. 1976).[27] Only two significant exhaustion decisions have been rendered by this Court, the last eight years ago. They cover only a meager fraction of the doctrine.[28] This area of the law

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27 Accord Montgomery v. Rumsfeld, 572 F.2d 250, 252 (9th Cir. 1978); G. Robinson & E. Gellhorn, The Administrative Process 217 (1974).

28 See K. Davis, Administrative Law Treatise § 20.07, at 466 (Supp. 1976). According to Professor Davis the cases are McGee v. United States, 402 U.S. 479 (1971); and McKart v. United States, 395 U.S. 185 (1969).

cries out for Supreme Court leadersip and clarification, and this Court can go far toward achieving that goal by holding that the lower courts erred in requiring exhaustion because: (1) exhaustion permits OFCCP to subject government contractors to economic coercion which frustrates effective challenges to its regulations; (2) petitioner challenged OFCCP's regulations as being in excess of authority, a matter beyond OFCCP's proper sphere of expertise; (3) OFCCP refused to consider legal challenges to its regulations; (4) the threatened harm petitioner faces if denied judicial relief outweighs any governmental interest in requiring exhaustion; (5) OFCCP is clearly exceeding its authority by seeking to recover back pay; and (6) OFCCP's passover practice violates due process and the unambiguous prohibition of § 208(b) of Executive Order 11246 that a contractor may not be debarred without an opportunity for a hearing.

While exhaustion is vitally significant in the present case it is, in a sense, only a superficial overlay under which simmer momentous societal concerns -- i.e., the permissible remedies for

violations of the laudable nondiscrimination objectives of the Executive Order. Until the exhaustion barrier is removed, OFCCP's regulations, recently recognized by this Court to be of questionable validity; Chrysler Corp. v. Brown, 99 S. Ct. 1705, 1719-20 (1979); will remain immune from effective challenge. So long as that is true, these profound questions will continue to be the preeminent issue in equal employment law. The petition for certiorari should be granted.

Respectfully submitted,

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